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has paid any, and if so, what amount in discharge of those incumbrances?

We accordingly refer this issue to the lower appellate Court, and we shall ask that Court to determine it with the utmost expedition. The Court will take such relevant evidence as the parties may tender. On return of the finding seven days will be allowed for filing objections. We shall reserve the question of costs for the final hearing.

[On this issue it was found that Munir-un-nissa had paid somewhat more than the amount of the unpaid purchase money. The appeal was accordingly decreed, and the plaintiff's suit dismissed with costs on the 7th of April, 1908.]

Appeal decreed.

APPELLATE CIVIL.

1908
February 18.

Before Mr. Justice Banerji and Mr Justice Richards.

NITA RAM (OBJECTOR) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY).*

Act No. I of 1894 *(Land Acquisition Act), section* 49 *—"House, manufactory or building"—Acquisition of part only required—Whether whole must be purchased.*

Land which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the "house, manufactory or building" within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. *Khairati Lal* v. *The Secretary of State for India in Council* (1) distinguished.

THE facts of this case are as follows:—

The Government were acquiring, under the powers conferred by the Land Acquisition Act, 1894, a small piece of land at the end of a garden occupied by one Nita Ram. The piece of land was situate at one corner at the extreme end of the garden which was used in connection with a house. Nita Ram objected that, inasmuch as the piece of land was part of the garden, it was a part of the house within the meaning of section 49 of the Land Acquisition Act and that he was entitled to insist that the

* First Appeal No. 43 of 1906 from a decree of L. G. Evans, District Judge of Saharanpur, dated the 18th of December 1905.

(1) (1889) I. L. R., 11 All., 378.

Government should take the whole house and garden, and not merely the particular bit of the garden which was necessary for the special purpose for which the land was being acquired. No evidence was offered by either side, but the District Judge went and inspected the locality himself. He came to the conclusion that the particular piece of land was not reasonably required for the full and unimpaired use of the house occupied by Nita Ram, and in this view he decided that the Government was not bound to take over the entire house and garden. From this decision Nita Ram appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

BANERJI and RICHARDS, JJ.—This is an appeal from a decree of the District Judge of Saharanpur upon a reference to him under section 49 of the Land Acquisition Act. The Government were acquiring, under the powers conferred by the Act, a small piece of land at the end of a garden occupied by Nita Ram. We expressly refrain from any expression of opinion as to the nature of Nita Ram's occupancy. That question is not before us. The piece of land is situate at one corner at the extreme end of the garden which is used in connection with the house. The appellant contends here, as he clearly contended before the District Judge, that, inasmuch as the piece of land was part of the garden, it was a part of the house within the meaning of section 49 of the Land Acquisition Act and that the owner of the property was entitled to insist that the Government should take the whole house and garden, not merely the particular bit of the garden which was necessary for the special purpose for which the land was being acquired. No evidence was offered by either side, but the learned District Judge went and inspected the locality himself. He clearly came to the conclusion that the particular piece of land was not reasonably required for the full and unimpaired use of the house occupied by Nita Ram, and in this view he decided that the Government was not bound to take over the entire house and garden. In our opinion, once he came to the conclusion that the plot to be acquired was not reasonably required for the full and unimpaired use of the house, his decision was perfectly correct. A case has been cited to us in support of the

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contention of the appellant that the entire house and garden should be taken. That is the case of *Khairati Lal* v. *The Secretary of State for India* (1). In that case, the facts of which differed considerably from the facts of the present case, a Bench of this Court held that where the Government were compulsorily acquiring certain out-offices in a compound, the owner could insist upon their taking the whole. That case, however, was decided under Act No. X of 1879, section 55. Section 55 of that Act is exactly the same as the first part of the first sub-section of section 49 of Act No. I of 1894. But sub-section I of section 49 of Act No. I of 1894 contains the following additional provision :—" Provided also that if any question shall arise as to whether any land proposed to be taken under this Act does or not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined. In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building."

In our judgment land which is not a house, manufactory or building in the literal sense and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the " house, manufactory or building " within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. In our judgment the appeal should be dismissed and we accordingly dismiss it with costs. We direct that these costs should include Rs. 100, which we hereby fix as the fee of the respondent's counsel.

Appeal dismissed.

(1) (1889) I. L. R., 11 All., 378.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

1908
February 25.

SHEO PRASAD AND ANOTHER (DECREE-HOLDERS) *v.* INDAR BAHADUR SINGH AND OTHERS (JUDGMENT-DEBTORS). *

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 179 (4)*—Application to take some step in aid of execution—Payment of process fees.*

Held that the mere payment of process fees on an application for execution, unaccompanied by any application asking the Court to take some specific action, will not have the effect of giving a fresh starting-point for limitation within the meaning of article 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Thakur Ram* v. *Katwaru Ram* (1) followed. *Vijiyaraghavalu Naidu* v. *Srinivasalu Naidu* (2) distinguished.

THE facts of this case are as follows :—

An application was presented within time for attachment of certain house property. An objection was filed to this attachment, which was rejected on the 18th December 1903. On the 12th of January 1904 the objectors instituted a regular suit. In consequence of this suit the Court postponed the sale of the property and struck off the application. On the 7th September 1904 the suit was dismissed, but on appeal it was decreed by the District Judge. The decree-holders preferred a second appeal to the High Court, which was decided in their favour. Whilst the case was pending in this Court the decree-holders, as a matter of precaution, applied for the arrest of the judgment-debtor. This application has been rejected by the Court below on the ground that there had been no application to the Court to take any step in aid of the execution within three years previously to the application for arrest. The decree-holders appealed to the High Court contending that this application was not barred by limitation.

Mr. *W. Wallach* and Munshi *Gokul Prasad*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.— This is a decree-holder's appeal in proceedings arising out of the execution of the decree. An application was presented within time for attachment of certain house property. An objection was filed to this attachment, which was rejected on the 18th December

* First Appeal No. 140 of 1907 from a decree of Amjad Ullah, Subordinate Judge of Mirzapur, dated the 9th of February 1907.

(1) (1900) I. L. R., 22 All., 358. (2) (1905) I. L. R., 28 Mad., 399.

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1903. On the 12th of January 1904 the objectors instituted a regular suit. In consequence of this suit the Court postponed the sale of the property and struck off the application. On the 7th September 1904 the suit was dismissed, but on appeal it was decreed by the District Judge. The decree-holders preferred a second appeal to this Court, which has been decided in their favour. Whilst the case was pending in this Court the decree-holders, as a matter of precaution, applied for the arrest of the judgment-debtors. This application has been rejected by the Court below on the ground that there had been no application to the Court to take any step in aid of the execution within three years previously to the application for arrest.

The decree-holders come here in appeal. The learned counsel who appears for them relies on the payment of process fees made on his application to attach the house within three years of the present application to arrest. In support of this case he refers to a decision of the Madras High Court—*Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (1). That case is in our judgment distinguishable from the present, as it appears that the document along with which the process fees were deposited did ask the Court to issue a sale proclamation: it clearly therefore fell within the language of article 179(4) of the second schedule of the Limitation Act. In this case when the process fees were paid no application was made to the Court to do anything. The decision of our brother Banerji in *Thakur Ram* v. *Katwaru Ram* (2) supports the view taken by the Court below, and with that decision we are in accord.

At the same time we are of opinion that the order now under appeal has not the effect of deciding that the decree has become time-barred. As said above, the application to attach and sell the house property was made within time. The granting of that application was suspended, not from any fault of the decree holders, but owing to the institution of the suit referred to above.

That suit has been finally decided in the decree-holders' favour by this Court on the 5th January 1907, and the dismissal of the application for arrest made while the application for

(1) (1905) I. L. R., 28 Mad., 399. (2) (1900) I. L. R., 22 All., 358.

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attachment and sale was in suspense will not, in our opinion, have the effect of preventing the decree-holders from exercising their right, now that the suit instituted by the objectors has been decided in their favour, to ask the Court to go on with the application for attachment and sale, which must be deemed to have been in suspense pending the decision of the suit. The order under appeal, however, cannot successfully be assailed, and we dismiss this appeal. Under the circumstances we make no order as to costs.

Appeal dismissed.

1908
February 26.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHAHBAZ KHAN AND OTHERS (PLAINTIFFS) v. UMRAO PURI AND OTHERS (DEFENDANTS).*

Public nuisance—Killing of cows by Muhammadans—Custom.

Under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. *Muttumira* v. *Queen-Empress* (1), *Queen-Empress* v. *Byramji Edalji* (2), *Queen-Empress* v. *Zaki-ud-din* (3), *Queen-Empress* v. *Imam Ali* (4), *Romesh Chunder Sannyal* v. *Hiru Mondal* (5) and *Hadjee Muzhur Ali* v. *Gundowree Sahoo* (6) referred to.

THIS was a suit brought by certain Muhammadan inhabitants of the village of Behta Goshain in the district of Budaun asking for a declaration of their right to slaughter cows within their own premises in the village for the purpose of daily food as well as for sacrifice under any limitation or otherwise. The circumstances which led to the institution of the suit are detailed in the judgment of the Court, but, briefly, the suit was instituted in consequence of certain Hindus having procured from the District Magistrate of Budaun an order prohibiting the slaughter of cattle altogether in the village of Behta Goshain. The defendants denied the right claimed by the plaintiffs and put forward

* First Appeal No. 247 of 1905 from a decree of L. H. Turner, District Judge of Shahjahanpur, dated the 22nd of July 1905.

(1) (1884) I. L. R., 7 Mad., 590.
(2) (1887) I. L. R., 12 Bom., 437.
(3) (1887) I. L. R., 10 All., 44.
(4) (1887) I. L. R., 10 All., 150.
(5) (1890) I. L. R., 17 Calc., 852.
(6) (1876) 25 W. R., Cr. R., 72.

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the case that there was no custom of slaughtering or sacrificing cows in their village, and that the plaintiffs were not competent to do anywhere in the village, any act which might be injurious or annoying to the defendants or repugnant to their religious feelings. They also denied that a suit of the kind was cognizable by a Civil Court. The suit was tried by the District Judge of Shahjahanpur, who found that the suit was cognizable by a Civil Court, but dismissed it upon the ground that the plaintiffs had failed to prove the existence of any such custom of slaughtering cows, either for food or sacrifice, as would entitle them to the decree they asked for. He further found that the plaintiffs could in no case be entitled to a declaration as against the world of their right to slaughter cattle. The plaintiffs appealed against the dismissal of their suit to the High Court.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants.

Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The litigation which has led to this appeal might, we think, have been avoided by the exercise of some common sense and toleration. The question before us is whether the members of the Muhammadan community in the village of Behta Goshain in the district of Budaun have a right to slaughter cows within their own premises in the village for the purpose of daily food as well as for sacrifice under any limitation or otherwise. The village in question has a population of about 3,000, of whom less than a thousand are Muhammadans and the remainder Hindus. The defendants on the 16th of November 1903 applied to the District Magistrate of Budaun for an order that the Muhammadans in the village might be forbidden to slaughter kine in the village. A charge was thereupon preferred against the plaintiff Shabhaz Khan and others, purporting to be under section 107 of the Code of Criminal Procedure. On the 6th of December 1903, the District Magistrate passed an order prohibiting the slaughter of any cattle in the village. In his order he states as follows :—"It appears that the Hindus far outnumber the Muhammadans. I find there are other villages in this thana circle where slaughter never takes place and where it would be strongly objected to, at Bilsi itself,

for instance. There is in fact a general understanding that it should only be allowed in places where it has been customary. For these reasons I forbid it in Behta Goshain." The following also appears in the order:—"As there is some ill-feeling over the matter, a copy of this order is to go to the Sub-Divisional Magistrate with a view to proceedings under section 107 of the Code of Criminal Procedure. If any action is taken the leaders of both sides should be bound over, but as the Muhammadans are in the wrong no security more than is absolutely necessary should be taken from the Hindus." Although this order purports to have been passed under section 107 it is clear that it was not an order under that section. Whether indeed it is anything more than mere *brutum fulmen* it is difficult to say, but, whatever it be, it is clear that the members of the Muhammadan community in the village of Behta Goshain cannot slaughter kine except at the risk of criminal proceedings. This order of the Magistrate was confirmed by the Commissioner on the 18th of February 1904.

The plaintiffs, feeling aggrieved at the prohibition of the exercise of what they conceived to be their legal rights, instituted the suit out of which this appeal has arisen.

The defendants took defence and denied the right claimed by the plaintiffs and put forward the case that there was no custom of slaughtering or sacrificing cows in their village, and that the plaintiffs were not competent to do anywhere in the village any act which might be injurious or annoying to the defendants or repugnant to their religious feelings. They also denied that a suit of the kind was cognizable in the Civil Court. The learned District Judge decided this last issue in favour of the plaintiffs, and we think rightly. The right denied was, as he said, a right of a substantial and valuable nature and not of the nature of a right to a mere dignity or privilege unconnected with fees or emoluments, such as were dealt with in the cases to which he referred. He, however, dismissed the plaintiffs' claim on the ground that they had failed to prove that they had continuously slaughtered kine for consumption at the slaughter-house in the village, or had continuously in observance of the sacrifice of kurbani killed kine on the Id-ul-Zuha in the slaughter-house or in their houses. The

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burden of proving such custom he laid upon the plaintiffs and dismissed the suit. He further found that the plaintiffs could in no case be entitled to a declaration as against the world of a right to slaughter cattle.

The appeal before us was then preferred, and the main contention advanced on behalf of the appellants is that the Court below was wrong in holding that the suit was based on custom alone; that independently of any custom every Muhammadan has a right to do all lawful acts with and upon his own property, and if any one interfere with the exercise of his legal rights to obtain from the Court a declaration of such rights; that the killing of cows on their own land not being an unlawful act, the plaintiffs were entitled to a decree irrespective of any custom; and further that the Court below was wrong in holding that the relief sought was claimed against the whole world and could not be granted as against the defendants alone.

Now upon the main question we should in the first place premise that the slaughter of cattle under certain circumstances would be a public nuisance, and it might also be obnoxious to rules and regulations lawfully promulgated for observance in a town or village, and further that kine must not be slaughtered in such places or manner as to be a nuisance or in contravention of any such rules and regulations. We may also say that it is in the highest degree desirable that the members of the different religious persuasions who are to be found in this country should, in the observance of their religious ceremonies as well as in the exercise of their lawful rights, show respect for the feelings and sentiments of those belonging to different persuasions, and avoid anything calculated to irritate the religious susceptibilities of any class of the community. But when a question in which the ordinary rights of property are involved comes before us, we must, before we can allow those rights to be infringed, endeavour to find the existence of some principle or rule of law justifying a ruling that the wishes or susceptibilities of individuals can be allowed to override such rights. Acts calculated to offend the sentiments of a class do not necessarily amount to a public nuisance. *Lex non favet votis delicatorum*—The law makes no allowance for the susceptibilities of the hyper-sensitive. In our judgment, then, we shall

deal simply with the broad question whether the right to slaughter kine on their own premises by Muhammadans in the village of Behta Goshain is illegal. Turner, C.J., in the case of *Muttumira* v. *Queen-Empress* (1) observed :—"A public nuisance is defined by the Penal Code as an act or omission which causes any common injury, danger or annoyance to the public or people in general who dwell or occupy property in the vicinity, or which must necessarily cause obstruction, danger or annoyance to persons who may have occasion to use any public right. It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds." In the case of *Queen-Empress* v. *Byramji Edalji* (2) an accused appealed against his conviction of an offence under section 268 of the Indian Penal Code in having cut up in his verandah meat which was to be cooked for a dinner party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Magistrate had found the accused guilty of committing a public nuisance, on the ground that he had done an act by which several persons who were Jains were much annoyed, they having a great repugnance to the taking of life under any circumstances. The conviction was set aside by Birdwood and Parsons, JJ., who in the course of their judgment observed that the annoyance complained of "neither did nor could cause any sensible or real damage. It was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals. It was thus of the nature of a sentimental grievance which could be felt only by persons holding certain views as to the killing of animals." In the case of *Queen-Empress* v. *Zaki-ud-din* (3) certain Muhammadans had been convicted on a charge of having for a religious purpose killed and cut up two cows before sunrise in a private compound partly visible from a public road, the killing of one cow being witnessed by a Hindu. It was held by Brodhurst, J., on an application for

(1) (1884) I. L. R., 7 Mad., 590. (2) (1887) I. L. R., 12 Bom., 437.
(3) (1887) I. L. R., 10 All., 44.

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revision of the order of conviction passed by the Magistrate under section 290 of the Indian Penal Code, that the circumstances proved did not amount to the commission of a public nuisance as defined in section 268 of the Code. Further, in the case of *Queen-Empress* v. *Imam Ali* (1) it was held by a Full Bench of this High Court that a cow was not "an object within the meaning of section 295 of the Indian Penal Code," and that the slaughter of a cow was not an offence under that section. The decision in *Romesh Chunder Sannyal* v. *Hiru Mondal* (2) is to the same effect.

In an earlier case in the Calcutta High Court, namely, *Hadjee Mâzhur Ali* v. *Gundowree Sahoo* (3) the legality of an order passed by a Deputy Magistrate in a prosecution under section 521 of the Criminal Procedure Code then in force, in which he treated the slaughter of cattle as a nuisance and ordered its discontinuance within a private enclosure belonging to some Muhammadans, was considered. Kemp and Glover, JJ., held that, although the act complained of might be shocking to the prejudices of Hindus, it could not properly be regarded as a nuisance, and that at any rate, the act being done in a private place and not on a thoroughfare, it could not be dealt with under section 521. In the course of their judgment the learned judges say "that Hindus should object with all their strength to the killing of cows in an enclosure within a few yards of their dwelling is natural enough, but this would not make such killing a nuisance in the legal sense of the term. The animals were sacrificed within a walled enclosure; no one could see the process from the outside, and it is not alleged that the sacrifices were made occasion for noisy or riotous demonstration which could affect the comfort of the neighbours. It was simply and solely a matter of religious feeling. The complainant had no objection to other animals being sacrificed within the enclosure in question; he even suggested that the petitioners might kill sheep or camels there if they liked—what he objected to was the slaughter of the sacred cow."

(1) (1887) I. L. R., 10 All., 150. (2) (1890) I. L. R., 17 Calc., 852.
(3) (1876) 25 W. R., Cr. R. 72.

The same question came before a Bench of this Court in Second Appeal No. 1028 of 1881 in the case of *Raghubar Dayal* v. *Ameeran Jahan* (unreported). In that case the respondent Ameeran Jahan brought a suit for a declaration of her right to offer a cow in sacrifice annually on certain days within the enclosure of her house, and, notwithstanding an order of the Deputy Magistrate forbidding the sacrifice, a decree was passed in her favour whereby the defendants were restrained from interfering with the sacrifice of an Id-ul-zuha victim of any kind on the premises of the plaintiff during the 10th, 11th and 12th days of the month of *Zilhig*, provided that the sacrifice should be completed within the inner quadrangle of the house and that from the commencement to the completion of the sacrifice the outer doors of the house should be kept closed, and provided also that the decree should have no effect as against any rule or regulation of the Municipality of Shahjahanpur, the town in which the parties resided, which might thereafter be promulgated regarding Id-ul-Zuha sacrifices in general. The decision of the learned officiating Judge was affirmed by Brodhurst and Tyrrell, JJ., on the 4th of May 1882.

In view of these authorities it appears to us indisputable that under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The learned District Judge was wrong in our judgment in holding that the *onus* lay upon the plaintiff appellants of proving the existence of a custom allowing the slaughter of kine in their village. The right claimed is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with.

We therefore allow the appeal, set aside the decree of the Court below and give a decree to the plaintiffs declaring that they have the right which they claim, namely, to slaughter cows in the *mazbah* belonging to them in Behta Goshain for daily consumption as also for consumption at festivals, and in their

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houses for the purpose of sacrifice, provided that in the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to that village. We also grant an injunction restraining the defendants from interfering with the rights of the plaintiffs appellants as above declared. The defendants respondents must pay the costs of this appeal as also the costs in the Court below.

Appeal decreed.

1908
February 26.

Before Mr. Justice Banerji and Mr. Justice Richards.

THAKUR PRASAD AND ANOTHER (PLAINTIFFS) *v.* GAURIPAT RAI AND ANOTHER (DEFENDANTS).*

Act No. VIII of 1890 *(Guardians and Wards Act), sections* 29 *and* 31—*Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.*

In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said in the order as to the rate of interest, the lenders are entitled only to a reasonable rate of interest on the moneys advanced. *Ganga Pershad Sahu* v. *Maharani Bibi* (1) followed.

THE facts which gave rise to this appeal were as follows:—

The suit was one for sale upon two mortgages, dated respectively the 14th and the 18th of June 1897. The mortgages were executed by one Sripat Rai as the guardian of the defendants respondents Gauripat Rai and Kamlapat Rai with the sanction of the District Judge. The amount of the first mortgage was Rs. 1,400 and that of the other Rs. 1,800 and they carried interest at the rate of Re. 1-8 per cent. per mensem, that is, Rs. 18 per cent. per annum. The learned judge in granting sanction for the raising of the loans permitted the guardian Sripat Rai to raise as much as he could by hypothecating a one anna share, though he directed the guardian not to spend more than Rs. 1,100 on the marriage of Gauripat Rai, the first respondent for the expenses of which the loan was to be raised.

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* First Appeal No. 129 of 1906 from a decree of Achal Bihari, Subordinate Judge of Gorakhpur, dated the 8th of February 1906.

(1) (1884) I. L. R., 11 Calc., 379.

The Court below has found that the plaintiff actually paid Rs. 1,400 on account of the first bond. As for the second bond it was represented to the Judge that Rs. 1,887 were required for redeeming certain ornaments which had been pawned with one Kali Charan. The learned Judge sanctioned the raising of that loan, and the ornaments are said to have been redeemed. The Court below allowed to the plaintiffs interest at the rate of 12 per cent. per annum, which it considered to be reasonable, and reduced the contractual rate, on the ground that the District Judge in sanctioning the raising of the loans did not specify the rate of interest at which the loans were to be taken. The plaintiffs appealed to the High Court urging that they were entitled to the full contractual rate of interest on the mortgages in suit.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Gulzari Lal*, for the appellants.

Mr. *Abdul Raoof* and Munshi *Ishwar Saran*, for the respondents.

BANERJI and RICHARDS, JJ.—This was a suit for sale upon two mortgages, dated respectively the 14th and the 18th of June 1897. The mortgages were executed by Sripat Rai as the guardian of the respondents with the sanction of the District Judge. The amount of the first mortgage was Rs. 1,400 and that of the other Rs. 1,800, and they carried interest at the rate of Re. 1-8 per cent. per mensem, that is, Rs. 18 per cent. per annum. The learned Judge in granting sanction for the raising of the loans permitted the guardian Sripat Rai to raise as much as he could by hypothecating a one-anna share, though he directed the guardian not to spend more than Rs. 1,100 on the marriage of Gauripat Rai, the first respondent, for the expenses of which the loan was to be raised. The Court below has found that the plaintiff actually paid Rs. 1,400 on account of the first bond. As for the second bond, it was represented to the Judge that Rs. 1,887 were required for redeeming certain ornaments which had been pawned with one Kali Charan. The learned Judge sanctioned the raising of that loan, and the ornaments are said to have been redeemed. The Court below allowed to the plaintiffs interest at the rate of 12 per cent. per annum, which it considered to be reasonable, and reduced the contractual rate, on the ground that the District

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Judge in sanctioning the raising of the loans did not specify the rate of interest at which the loans were to be taken. The course adopted by the Court below is justified by the ruling of their Lordships of the Privy Council in *Ganga Pershad Sahu* v. *Maharani Bibi* (1).

We are of opinion that in all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction, not only the amount to be raised and the property to be mortgaged, but also the rate of interest or at least the maximum rate of interest at which the loans are to be raised. This was not done by the learned Judge in this case, and therefore the plaintiffs are only entitled to a reasonable rate of interest. We see no reason to differ from the opinion of the Court below that 12 per cent. per annum was a reasonable rate in the present case. This is the only question raised in the appeal of the plaintiffs. The appeal must therefore fail, and we accordingly dismiss it.

The respondents have preferred objections under section 561 of the Code of Civil Procedure to the effect that the Court below should not have allowed to the plaintiffs a decree for Rs. 300 out of the amount of the first bond and for Rs. 400 out of the amount of the second bond. It is alleged on their behalf that these amounts were not actually paid. The evidence on the point is not satisfactory. On the contrary, as the Court below finds, the account books of the plaintiffs and the evidence adduced on their behalf prove the payment of the full amounts of the two bonds. As for Rs. 300 out of the amount of the first bond which exceeded the amount which the District Judge had authorized the guardian to spend on the marriage of one of the minors, we think, having regard to the form of the order made, that the creditor is entitled to recover what he actually paid. As we have said above, the Court below has found that the amount of the first bond was actually paid by the plaintiffs, and we see no reason to come to a different conclusion. We accordingly dismiss the objections also. The appellants will pay the costs of the appeal and the respondents the costs of the objections.

Appeal dismissed.

(1) (1884) I. L. R., 11 Calc., 879.

1908
March 3.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

GULZARI MAL AND ANOTHER (DEFENDANTS) *v.* KABIR-UN-NISSA (PLAINTIFF).*

Civil Procedure Code, section 562—Remand—Appeal from order of remand after decision of the suit in accordance therewith.

Held that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. *Salig Ram* v. *Brij Bilas* (1) and *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) followed.

THIS was an appeal from an order of remand. The order appealed against was passed on the 12th of November 1906. Under that order the case went to the Court of first instance, and was by that Court decreed in favour of the plaintiff respondent on the 28th of January 1907. The present appeal, though it bears an endorsement of the stamp reporter, dated the 19th of January 1907, was not presented until the 29th January 1907, one day after the decree in plaintiff's favour had been passed. The appellants filed no appeal from the decree which had been passed against them. At the hearing a preliminary objection was raised on behalf of the respondent that no appeal lay, in as much as it had not been filed until after the suit had been re-heard in pursuance of the order under appeal, and this objection was supported by the two rulings referred to in the judgment of the Court.

Mr. *C. Ross Alston* and Munshi *Gokul Prasad*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondent.

AIKMAN and KARAMAT HUSEIN, JJ.—This is an appeal from an order of remand. A preliminary objection to the hearing of this appeal is raised by the learned vakil for the respondent. It appears that the order of remand now appealed against was passed on the 12th of November 1906. Under that order the case went to the Court of first instance, and was by that Court decreed in favour of the plaintiff respondent on the 28th of January 1907. The present appeal, though it bears an endorsement of the stamp reporter, dated the 19th of January 1907,

* First Appeal No. 5 of 1907, from an order of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 12th of November 1906.

(1) (1907) I. L. R., 29 All., 659. (2) (1905) I. L. R., 32 Calc., 1023.

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was not presented until the 29th January 1907, one day after the decree in plaintiff's favour had been passed.

The appellants filed no appeal from the decree which had been passed against them. In support of his objection the learned vakil for the respondent relies on a decision of the Calcutta High Court in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1), and on a decision of this Court in *Salig Ram* v. *Brij Bilas*, (2). These decisions support the preliminary objection taken. Were the matter *res integra* there might be something to be said in appellants' behalf; but we are bound by the decision of this Court. When the case went back to the Court of first instance, it was heard in the presence of the defendants, who, we are told, adduced evidence. We consider that the defendants, if they intended to appeal from the order of remand, might well have asked the Court of first instance to defer hearing the case until their appeal against the order of remand had been disposed of; but they did not do so. We are bound by the decision in the case of *Salig Ram* v. *Brij Bilas*, mentioned above. We, therefore, sustain the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

1908
March 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

TUHI RAM (PLAINTIFF) *v.* IZZAT ALI AND OTHERS (DEFENDANTS).*

Execution of decree—Sale of ancestral property—Civil Procedure Code, section 320—Rules framed by Local Government—Application under Rule 17 (XIIIA).

One of several co-owners of ancestral property which had been sold by the Collector under the Rules † framed by the Local Government under section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside, making at the same time the necessary payments into Court required by the Rule.

† The rules referred to are as follows :—

17 (XII). The decree-holder, or any person whose immovable property has been sold under these rules, may apply to the Collector to set aside the sale

* First Appeal No. 99 of 1906 from a decree of H. David, Subordinate Judge of Meerut, dated the 17th of February 1906.

(1) (1905) I. L. R., 32 Calc., 1023. (2) (1907) I. L. R., 29 All., 659.

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Held that upon the presentation of the latter application under Rule 17 (XIIIA) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Net Lall Sahoo* v. *Sheikh Kareem Bux* (1) and *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (2) referred to.

THE facts of this case are as follows. One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral, and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under

on the ground of a material irregularity in publishing or conducting it, and in the event of the sale being set aside, the Collector may sanction the refund of auction fees.

But no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason of such irregularity.

17 (XIII). If no such application as is mentioned in the last preceding rule be made or if such application be made and the objection be disallowed, the Collector shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Collector shall pass an order setting aside the sale.

17 (XIIIA). Any person whose immovable property has been sold may, at any time within 30 days from the date of sale, apply to the Collector to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to 5 per cent of the purchase money; and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

If such deposit is made within 30 days the Collector shall pass an order setting aside the sale: Provided that, if a person applies under rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this rule. Nothing in this rule shall be construed to relieve the judgment-debtor from any liability he may be under, in respect of costs and interest not covered by the proclamation of sale.

(1) 1896) I. L. R., 23 Calc., 686. (2) (1901) I. L. R., 29 Calc., 1.

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Rule 17 (XII) of the Rules framed by Government under section 320 of the Code of Civil Procedure. On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, despositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His application was rejected by the Collector on the 11th of November 1904, on the ground, apparently, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. The present suit was then instituted by the auction purchaser asking that the sale at which he purchased might be declared a good and valid sale. The Court of first instance (Subordinate Judge of Meerut) found that the sale was invalid and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The matters which have led to this appeal are shortly as follows:—One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under Rule 17 (XII). On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, depositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His

application was rejected by the Collector on the 11th of November 1904, on the ground, so far as we understand the order, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. The Collector seems to have held that Abdul Hai, one of the owners of the property, could not apply under Rule 17 (XIIIA) so long as there was pending an application on the part of another co-owner under Rule 17 (XII). In his order the Collector says:—"It has been urged that he (*i.e.*, Abdul Hai) is only a mortgagor under the second mortgage represented by the amount of Rs. 2,234-8-0 and that Izzat Ali is a mortgagor under the first mortgage also represented by the amount of Rs. 24,632; that they are therefore different persons. I am unable to accept this contention. They are both judgment-debtors and originally joint defendants in the suit, and I hold that Abdul Hai is not entitled to make the application under section 310A unless the application under section 311 is withdrawn." He therefore, as the application of Izzat Ali had not been withdrawn, rejected the application of Abdul Hai. We do not profess to understand exactly the meaning of the language used by the Collector, but we take it that he refused the application of Abdul Hai on the ground that he alone was not a person who could apply under Rule 17 (XIIIA). We may point out that by oversight he cited in his order section 310A and section 311 of the Code of Civil Procedure instead of Rule 17 (XII) and 17 (XIIIA) of the Rules of Government passed under section 320.

An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. In consequence of this order the present suit was instituted.

The Rules to which we have referred are Rules framed by the Local Government under section 320 of the Code of Civil Procedure for regulating the sale of ancestral lands by the Collector. Rule 17 (XIIIA) corresponds with section 310A of the Code. The Court below dismissed the plaintiff's suit and hence this appeal.

It was argued before us at considerable length that no appeal lay from the Collector's order to the Commissioner, but in the

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view which we take of the case it is unnecessary to determine this question. It appears to us that when Abdul Hai deposited the money required to be deposited by the Rule in question the Collector was bound to pass an order setting aside the sale and had no option in the matter. The language of the Rule is as follows:—"If such deposit is made within 30 days the Collector *shall pass an order setting aside the sale.*" But it is said that the proviso to the section justified the Collector in passing the order now impeached. That proviso is that if a person applies under Rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this Rule, that is Rule 17 (XIIIA). The contention is that inasmuch as Izzat Ali, one of the co-owners, made the application to which we have referred under Rule 17 (XII), Abdul Hai could not, in view of the language of the section, succeed in an application to have the sale set aside under Rule 17 (XIIIA). It is said that "any person whose immovable property has been sold" must mean all the owners of the property and not a single co-sharer, and that Abdul Hai being only a co-sharer without the concurrence of the other co-sharers could not take advantage of the rule. We are unable to take this view of the section. It appears to us that the words "any person whose immovable property has been sold" enable co-sharers of the property which has been sold to apply to the Court to have the sale set aside, and that it is not necessary that all the co-sharers should join in the application. So soon as Abdul Hai made his application and paid the money as required by the Rule, it was in our opinion the duty of the Collector to pass an order setting aside the sale. He ought not, after the deposit was made, to have entertained the application which was made by Izzat Ali. We are confirmed in this view of the section by two decisions of the Calcutta High Court, namely in *Net Lall Sahoo* v. *Sheikh Kareem Bux* (1) and *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (2). Whether or not, therefore an appeal lay to the Commissioner, we are of opinion that the Collector acted *ultra vires* in proceeding to confirm the sale

(1) (1896) I. L. R., 23 Calc., 686. (2) (1901) I. L. R., 29 Calc., 1.

after Abdul Hai had made the deposit and filed an application to have the sale set aside under the provisions of Rule 17 (XIIIA). We therefore dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

1908 *March* 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

ASHARFI KUNWAR AND OTHERS (DEFENDANTS) *v.* RUP CHAND (PLAINTIFF).*

Hindu law—Adoption—Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.

Held that according to the law and custom prevailing amongst the Jain community a widow has a power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindas*, to give a son in adoption after the death of her husband.

Held also that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal* v. *Banarsi Das* (1) followed. *Chotay Lall* v. *Chunno Lall* (2), *Amava* v. *Mahadgauda* (3), *Sri Balusu Gurulingasuami* v. *Sri Balusu Ramalakshmamma* (4) and *Radha Mohan* v. *Hardai Bibi* (5), referred to.

Held also that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *primâ facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassee* v. *Sreenath Bose* (6) and *Sardar Singh* v. *Ram Kunwar* (7), followed. *Tacoordeen Tewarry* v. *Ali Hossein Khan* (8) referred to. *Tarinee Churn Chowdhry* v. *Sharoda Soondaree Dossee* (9), *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (10), *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (11) and *Har Dyal Nag* v. *Roy Krishto Bhoomick* (12) distinguished.

* First Appeal No. 32 of 1906 from a decree of Nihal Chandar, Subordinate Judge of Saharanpur, dated the 8th of November 1905.

(1) (1907) I. L. R., 29 All., 495.
(2) (1878) L. R., 6 I. A., 15.
(3) (1896) I. L. R., 22 Bom., 416.
(4) (1899) I. L. R., 22 Mad., 398.
(5) (1899) I. L. R., 21 All., 460.
(6) (1868) 9 W. R., 463.
(7) Weekly Notes, 1902, p. 62.
(8) (1874) L. R., 1 I. A., 192: at p. 206.
(9) (1869) 11 W. R., 468.
(10) (1869) 12 W. R., P. C. R., 1.
(11) (1873) 21 W. R., 84.
(12) (1875) 24 W. R., 107.